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Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 358.

LAUREANO MAYSONET GUZMAN,
Petitioner,

v.

RAMON RUIZ PICHIRILO,
Respondent.

BRIEF FOR RESPONDENT.

Opinions Below.

Respondent adds to petitioner's statement that the opinion of the Court of Appeals is also reported at 1961 A.M.C. 1588.

Statement of the Case.

Respondent adds to petitioner's Statement of the Case the following:

The shackle which broke was a "new" shackle (R. 10) "recently bought" (R. 23; 290 F. 2d 813).

Bordas & Co., petitioner's employer, had compensation coverage in the State Insurance Fund (R. 3, 9) under the Workmen's Accident Compensation Act of Puerto Rico (11 L.P.R.A. §§ 1-42, 1955) (Petitioner's Brief 14).

When respondent filed claim to the vessel in the form of a motion (R. 4-5) he filed with it a bond in the amount of $20,000 for discharge of the CARIB from arrest (R. 5-6). The motion was consented to and the discharge was ordered by the District Judge (R. 5).

We do not agree with petitioner (Brief 3) that the CARIB's master described Bordas & Co., the demisee, as a third party (R. 10-11).

The Court of Appeals reversed the District Court upon the incorrectness of the following ruling (R. 19):

> "The evidence is so meagre in this respect that I can find no lawful basis for holding that the vessel was under a demise charter to Bordas & Co."

Questions Presented.

Respondent does not agree with the second question as stated by the petitioner (Brief 6). We think the question is:

> Does the Court of Appeals have the power to reverse an incorrect ruling of law, viz., that the evidence was insufficient to permit a finding, and then itself, on undisputed, unimpeached testimony, make the proper finding?

Summary of Argument.

The first question presented by petitioner (Brief 5) is whether a vessel in the possession and control of a demise charterer is liable *in rem* for injuries to a longshoreman under the circumstances presented by the record. The District Court found that respondent was "the owner in

possession and control of the vessel M/V Canna" (R. 20). The Court of Appeals held that there was a demise to Bordas & Co. (R. 24; 290 F. 2d at 813). On the question of the existence of a demise, respondent argues that the Court of Appeals did not transgress the ruling of this Court that findings of fact of the Trial Judge may not be set aside unless clearly erroneous. The argument is that the District Court improperly ruled that there was insufficient evidence to support a finding that the vessel was under demise. The Court of Appeals corrected this ruling and properly made the correct finding on uncontradicted credible testimony.

Point II deals with the liability *in personam* of the owner of a vessel who has demised it to another. Respondent argues that after demise the owner *pro hac vice*, and not the general owner, bears the *in personam* liabilities arising out of the ship's operation. The owner of a vessel in the possession and control of a demisee does not bear personal responsibility for unseaworthiness arising after the demise.

Point III treats the question of the vessel's liability *in rem* and the theory of personification. Respondent shows that petitioner's only remedy against the demisee-stevedore (his employer) was his statutory compensation. Respondent also argues that, when the owner is not liable *in personam* and the demisee's liability has been statutorily limited and (as so limited) satisfied, a separate additional recovery should not be exacted by way of the ship. A ship is not a person; it is but a special kind of property, as this Court has held in various contexts.

Respondent adverts in Point IV to its contention in the Court of Appeals that, should M/V Canna be held liable *in rem*, this liability should be limited to the amount of the bond filed by agreement for discharge of the vessel

from arrest. This contention was not reached in the Court below. It remains to be passed upon if *in rem* liability is sustained.

Argument.

I. The Court of Appeals properly reversed the Trial Court's ruling that the evidence was insufficient to permit a finding of demise, because the only evidence on the point wholly supported that finding, and this evidence was neither incredible nor controverted.

The decision of the Court of Appeals depends upon a holding that the Canm was demised by respondent to Bordas & Co., petitioner's employer. The District Court ruled against the defense based on the demise (R. 19) because it found that the respondent was "the owner in possession and control of the vessel M/V Canm" (R. 20).* Petitioner now treats the action of the District Judge as though it were solely a question of fact-determination based upon the credibility of a witness, and thus within the ruling of this Court in *McAllister v. United States*, 348 U.S. 19, 20 (1954). In *McAllister* this Court equated the power of the Court of Appeals in admiralty to that granted to the reviewing Court by Rule 52(a) of the Federal Rules

*A charter of a vessel occurs when the owner, for valid consideration, makes the usual cargo spaces of the vessel or the entire vessel exclusively available for the use of the charterer. In a voyage or time charter the owner retains possession and control, with the use of the necessary room for the crew and stores, and the charterer has the use of the cargo spaces. A demise results when the hiring is on such terms that the owner gives to the hirer the possession, control and direction of the entire vessel. Robinson, Admiralty, 502-508 (1939). Scrutton, Charterparties, 4-9 (16th ed. 1955). "A demise, of course, is not a time charter, and it need not be of a bare boat" (R. 23; 290 F. 2d at 613). *United States v. Shea*, 152 U.S. 178 (1894).

of Civil Procedure: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Here, of course, the Trial Court did make a finding that respondent Pichirilo was the owner in possession and control of the vessel. This finding, however, was based upon the statement in the Trial Court's opinion that "the evidence is so meagre in this respect that I can find no lawful basis for holding that the vessel was under a demise charter to Bordas & Co." (R. 19). The Trial Court's ruling was thus equivalent to a directed verdict on this point in a jury-tried case.

Apart from the evidence of Jose Lora, master of the CARIB, that he was "employed" (R. 10) by the respondent, all of the evidence concerning the operation of the CARIB came from Luis Manuel Bordas, director-partner of Bordas & Co. (R. 11-17). There was no finding by the Trial Court that the testimony of this witness was not credible. Indeed, the District Judge relied upon his testimony in ruling that he could not hold that the vessel was demised (R. 19). It was this ruling which the Court of Appeals corrected. Pointing out that there was sufficient evidence to support a demise, it reversed the premise on which the finding rested and then made the only finding possible in the light of the evidence in the record. The Court of Appeals did not usurp the Trial Judge's role as assayer of the testimony. There is thus no conflict with *McAllister* v. *United States*, *supra*, or Rule 52(a) of the Rules of Civil Procedure.

Petitioner insists that the District Judge felt that the testimony of Bordas was incredible, an argument based largely upon the colloquy following Bordas's testimony (R. 17):

"Mr. Rodriguez: . . . The operator is Bordas and Company.

"The Court: That may be what you think, but I don't believe that Bordas is the operator of the boat."

This is, of course, a statement, not of unwillingness to believe the testimony of Bordas, but of unwillingness to draw a given conclusion from that testimony.

Bordas testified that his company had been operating the Canm for around five years and that he paid the respondent $200 a month. In addition, he paid all the expenses of the boat. "I mean paying the payrolls, the captain's salary, all the payrolls of the vessel, the food of the crew, the fuel, the maintenance, the repair, the dry docking, the insurance, the port charges, and all the expenses that go with the operation of a vessel" (R. 13). In addition, Bordas said that in the "usual" charter party, plainly referring to a time or voyage charter, "the only thing that the charterer pays is port charges and fuel for the intended voyages" (R. 15). And he continued: "But in this case it is a kind of charter, because it does not comply with the regular provisions of a charter party. I pay the seamen, food, repair, maintenance, drydocking; which in a regular charter party are excluded" (R. 15). Mr. Bordas was clearly distinguishing between a demise, wherein the charterer pays all of the expenses and the charter hire, and a time or voyage charter, wherein the charterer pays only for port charges and fuel (plus, of course, the charter hire).

Petitioner complains (Brief 20) that the testimony does not disclose the details of the charter, as, for example, date of commencement, date of termination and conditions of default. We point out that there was no cross-examination of the witness to develop any of the things about

which petitioner complains. Petitioner also says (Brief 20) that there is no evidence of responsibility for surveys and repairs or for insurance, but the above-quoted testimony of Bordas makes it plain that the charterer paid for those things, as well as all of the expenses that go with the operation of a vessel.

Since the testimony of Bordas was inherently credible, was not found to be incredible by the Trial Judge and indeed was relied upon by him in his opinion (R. 19), though incorrectly quoted (R. 23, 290 F. 2d, at 813) the Court of Appeals properly and fully corrected the judge's error of law.*

Reed v. *United States*, 78 U.S. (11 Wall.) 591, 601 (1870), makes the test of a demise "possession, command, and navigation." The words of the witness Bordas, "controlling, operating and managing the vessel" (R. 16), with a master under his orders (R. 15), meet the test of *Reed* v. *United States*.

Petitioner asks (Brief 21) what ends have been accomplished by the transfer of the vessel, and answers this: "None, except to destroy the right and lien of the petitioner" (Brief 21-22). One purpose, at least, of every demise is to provide for the owner a specified payment for the use of the vessel and to put the risks of profit or loss in the vessel's operation on the demisee. That purpose is here emphasized, because the owner-respondent could not for political reasons leave the Dominican Republic (R. 13).

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*The fact that the master, Jose Lora, was "employed" by the respondent does not prevent a demise. He was under the orders of Bordas & Co. (R. 15), and Bordas & Co. was "controlling, operating and managing the vessel" (R. 16). *United States* v. *Shea*, 152 U.S. 178 (1894). *Grilles* v. *United States*, 229 F. 2d 687, 689-690 (2d Cir. 1956). *The Willie*, 231 Fed. 865 (2d Cir. 1916).

II. THE OWNER OF A VESSEL WHICH IS IN THE POSSESSION AND CONTROL OF A DEMISEE IS NOT LIABLE IN PERSONAM FOR INJURIES CAUSED BY AN UNSEAWORTHY CONDITION CREATED AFTER THE DEMISE AND WHILE THE VESSEL WAS IN THE DEMISEE'S POSSESSION AND CONTROL.

This Court has never had squarely to decide the issue posed by the facts of this case. The Court of Appeals for the First Circuit has held that an owner who surrenders all control of his vessel to a demisee is not liable *in personam* for unseaworthiness, even if such unseaworthiness pre-existed the demise. *Vitozi* v. *Balboa Shipping Co.*, 163 F. 2d 286 (1st Cir. 1947). The First Circuit recognized in its opinion in the instant case (R. 24; 290 F. 2d, at 813-814) that possibly the rule of *Vitozi* should be limited to unseaworthiness which arose after the demise. The doctrine of *Vitozi* as thus modified accords with the position of the Second Circuit, which held in *Cassella* v. *Lykes Bros. S.S. Co.*, 174 F. 2d 794 (2d Cir. 1949), that the owner would be liable to an injured longshoreman only for that unseaworthiness existing at the time of the demise. In the first *Grillea* decision (*Grillea* v. *United States*, 229 F. 2d 687 (2d Cir. 1956)), the Second Circuit held that the owner of a vessel was not liable to an injured longshoreman for unseaworthiness arising while a demisee was operating the vessel.

We urge that the principle underlying these decisions fully accords with the mandate of this Court in *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U.S. 85 (1946), that an owner owes a longshoreman a non-delegable duty to provide a seaworthy vessel.

This Court has never held that the owner's non-delegable duty of seaworthiness covers an unseaworthy condition developing after the demise and while the vessel was in the possession of an owner *pro hac vice*. The case of *Cru-*

mady v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), clearly involved a time charter and not a demise. In that case a circuit breaker cut-off whose faulty adjustment caused the accident had been adjusted "by those acting for the vessel owner" (358 U.S. at 427); the crew members, as this Court recognized, were the owner's servants and not those of the charterer. The libel alleged that the owners (incorrectly named) operated the vessel through their agents, servants or employees (article 11 of the libel, printed at page 9 of the *Crumady* Record, Nos. 61 and 62, October Term, 1958). The owner claimed the vessel, and in its answer admitted ownership and, in article 11 admitted that it operated the vessel—excepting those parts turned over to the stevedore and longshoremen (*Crumady* Record 12)—thus negating surrender of possession and control to a demisee. Claimant's cross-petition for writ of certiorari in No. 62 states that the stevedoring contract was made by the time charterer (pp. 3, 5). There was no issue as to the relative responsibilities of the general owner *vis-à-vis* the owner *pro hac vice*.*

It is elementary that a demisee, being the owner *pro hac vice*, bears during the demise the responsibilities of the owner. The general owner is not so liable. *Leary* v. *United States*, 14 Wall. 607, 610 (1871). *Muscelli* v. *Frederick Starr Contracting Co.*, 296 N.Y. 330 (1947).

> "In general, all *in personam* liabilities arising out of the ship's operation are brought home to the demise charterer. It may be of immense economic importance to him that he, as owner, is the warrantor of seaworthiness of the vessel to seamen including long-

*We think the statement of this Court in *Waterman Steamship Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421, 424 (1960), that *Crumady* was decided on the premise that the stevedore was engaged "by the party *operating* the ship under a charter" (italics supplied) was an inadvertence.

shoremen, who work aboard her, and that he in consequence may be held liable for personal injuries suffered as a result of breach of the absolute duty to provide a safe place to work and safe implements to work with." Gilmore & Black, The Law of Admiralty, 218 (1957).

See also *The Barnstable*, 181 U.S. 464 (1901).

To visit *in personam* responsibility upon the respondent here would be to undermine and overturn established principles apportioning liability under demise charter arrangements.

III. The Carib was not liable in rem to petitioner, because, as a longshoreman employed by her demisee, he was entitled only to compensation and because the unseaworthiness arose after the demise.

A. Liability of the demisee during whose control, operation and management the unseaworthy condition arose was limited to the payments made under the Workmen's Accident Compensation Act of Puerto Rico.

Bordas & Co. was operating the Carib as demisee at the time of the petitioner's injury (R. 24; 290 F. 2d, at 813). As owner *pro hac vice* it warranted to petitioner that the vessel was seaworthy. Petitioner was a longshoreman-employee of Bordas & Co. (R. 23; 290 F. 2d, at 813; Petitioner's Brief 3). The Workmen's Accident Compensation Act of Puerto Rico (11 L.P.R.A. § 21 (1955), quoted at Petitioner's Brief 2-3), provides:

> "When an employer insures his workmen or employees in accordance with this chapter, the right herein established to obtain compensation shall be the only remedy against the employer . . ."

The Act unquestionably applies to petitioner (Petitioner's Brief 14; R. 9). The demisee had fully satisfied his statutory obligations to petitioner (R. 3, 9). Thus, the demisee's only obligation to petitioner was under the Compensation Act.

B. When the owner is not liable in personam, *and liability of the demisee has been validly limited and (as limited) satisfied, the vessel is not liable* in rem.

We have no quarrel with the general proposition, so well grounded in the admiralty law, that, even though a vessel is under demise, she may be condemned *in rem* to satisfy obligations of the demisee.

Petitioner, however, would have this Court hold that a vessel may be condemned even where the general owner is not liable *in personam*, the demisee is not liable beyond compensation payments and the vessel was not in control of a compulsory pilot.* The petitioner thus asks this Court to carry the concept of the vessel's personality to an extent far beyond the principles enunciated by any court here or in England.

There have, of course, been many cases which refer to the *in rem* liability of the ship as a personification of the vessel, as though she herself were an independent actor in the situation. As discussed by the Court below, the personification of the vessel is a convenient shorthand method of expressing legal results, but the characterization is not a satisfactory basis for achieving them (R. 25; 290 F. 2d, at 814).

This Court, like others, has used the personification theory. At the same time the Court has recognized the fictive nature of the theory and has freely discarded it when an

*As in *The China*, 74 U.S. (7 Wall.) 53 (1868).

application did not accord with modern ideas of civil responsibility.

In *The Eugene F. Moran*, 212 U.S. 466 (1909), Mr. Justice Holmes, writing for a unanimous Court, said at page 474:

> ". . . No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible on principles of agency or otherwise, is carried further here than in England. . . . Possibly the survival of the fiction has been helped by the convenient security that it furnishes, just as no doubt the responsibility of a master for a servant's torts, that he has done his best to prevent, has been helped by the feeling that it was desirable to have some one who was able to pay. . . . But after all a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended. . . ."

And in *The Western Maid*, 257 U.S. 419, 433 (1922), he wrote for the majority:

> "It may be said that the persons who actually did the act complained of may or might be sued and that the ship for this purpose is regarded as a person. But that is a fiction not a fact and as a fiction is the creature of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed. It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force."

We believe it significant that the author of these opinions, whose earlier writings are so often cited in support of the personification theory (Holmes, The Common Law,

26-27 (1881)), rejected the fiction of personification when faced with the need to decide actual cases in which its application would be inconsistent and illogical. At any rate, not even in The Common Law did Holmes express the view that the vessel should be subject to condemnation without pre-existing *in personam* liability of someone lawfully and properly responsible for the vessel. He thought that it was the idea of the ship as security for some person's liability which had helped to keep the personification theory alive (The Common Law, 28).

Recently this Court, in *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960), in dealing with the argument that a single libel against a vessel *in rem* and her owner *in personam* involved two distinct civil actions, commented that that view was based upon "a long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment" (364 U.S., at 22-23, citing Holmes, The Common Law (1881), 26-27). The Court continued (364 U.S., at 23-24):

> "The fiction relied upon has not been without its critics even in the field it was designed to serve. It has been referred to as 'archaic,' 'an animistic survival from remote times,' 'irrational' and 'atavistic.' Perhaps this is going too far since the fiction is one that certainly had real cause for its existence in its context and in the day and generation in which it was created. A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still. . . .
>
> "This Court has not hesitated in the past to refuse to apply this same admiralty fiction in a way that would cut down, as it would here, the scope of con-

gressional enactments. In fact, Mr. Justice Bradley, speaking for the Court, said at one time, in construing a statute which had limited a shipowner's liability but had failed to refer to the 'personal' liability of the vessel:

"'To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated. . . .' *The City of Norwich,* 118 U.S. 468, 503 [1886].

"Fifty-seven years later, this Court was confronted with a similar argument about another section of the same statute, and after referring to the analysis in *City of Norwich* concluded,

"'The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. . . . Congress has said that the owner shall not "answer for" this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property.' *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo,* 320 U.S. 249, 253-254 [1943]."

The Court declined to recognize the fiction of personification to defeat transfer of the action to a more convenient forum under 28 U.S.C. § 1404(a) (1948).

In both *The City of Norwich* and *Consumers Import Co., supra,* this Court dealt with the Limitation of Liabil-

ity of Shipowners statutes (46 U.S.C. §§ 181-191 (1952)). The fact that in those cases it was the Congress which had limited the owner's liability should, we submit, make no difference. If, by general principles of law, the demisor of a seaworthy vessel is not personally liable, and if the demisee's liability has been statutorily limited, and if, further, the demisee has met all his statutory obligations, to persist in saying that the ship may nevertheless be condemned seems to us, as it has to this Court, "like talking in riddles." We submit, moreover, that the solution to the riddle, if any exists, does not emerge from an examination of cases in which "personification" has apparently been applied.

1. The forfeiture cases do not support the application of personification to civil actions.

Forfeitures either for violations of an embargo act (*The Little Charles*, 26 Fed. Cas. 979 (No. 15, 612) (C.C. D. Va. 1818)) or for piracy (*The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *United States* v. *The Malek Adhel*, 43 U.S. (2 How.) 210 (1844)) depend upon statutory provisions and the power of Congress to impose forfeiture of a vessel without regard to the owner's personal involvement. Chief Justice Marshall (on circuit) in *The Little Charles* and Mr. Justice Story in *The Palmyra* and *The Malek Adhel* both used language of personification which was perhaps appropriate, since the libels were in admiralty and the property was in each instance a vessel, but which was unnecessary at least in the two last-cited cases.* The same sanctions of forfeiture of the participating or of-

*The *Little Charles* dealt with a question of evidence and the Court found it appropriate to use the master's manifest to support a condemnation of the vessel even though it might not have been admissible against the owner *in personam*.

fending vehicle are familiar and of long standing in dealing with smuggling, 19 U.S.C. § 1703 (1958), and similar illegal acts ashore, 49 U.S.C. § 782 (1952). They depend not at all upon admiralty theories of personification of the *res*.

2. The compulsory pilot cases illustrate the outside limit of personification in civil cases.

In the compulsory pilot situation the vessel operator is not liable *in personam* for the faults of a compulsory pilot, because there is no agency (*Homer Ramsdell Transportation Co.* v. *La Compagnie Générale Transatlantique*, 182 U.S. 406 (1901)); but the vessel is nevertheless liable *in rem*. *The China*, 74 U.S. (7 Wall.) 53 (1868), is the farthest extreme to which "personification" has been pressed in this Court in "taking one man's property to satisfy another man's wrong, . . ."* Even in the compulsory pilotage cases the pilot himself is liable for his own faults.

3. Where bill of lading provisions protect the owner personally, the ship may not be condemned.

This Court has refused to condemn the ship *in rem* where neither the owner nor the party in possession was personally liable. In *Queen of the Pacific*, 180 U.S. 49 (1901), the bill of lading required all claims against the shipowner to be brought within a certain time. The Court held that an action *in rem* after that time could not be maintained, saying:

> "The '*claim*' is in either case against the company, though the *suit* may be against its property." 180 U.S. at 53. (Author's italics.)

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*The *Eugene F. Moran*, 212 U.S. 466, 474 (1909).

4. When a statute limits civil liability, the vessel is not liable *in rem*.

In *The City of Norwich*, 118 U.S. 468 (1886), and in *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo*, 320 U.S. 249 (1943), where the owner's liability was limited by statute, the Court declined to permit action *in rem* against the vessel to defeat the limitation which had been granted to the shipowner.

5. The vessel may not be condemned where the owner is the stevedore-employer protected by the Longshoremen's and Harbor Workers' Compensation Act.

In at least three cases United States Courts of Appeal have declined to permit an injured longshoreman to proceed *in rem* against the vessel on which he was working where that vessel was owned by the employer who had complied with the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1952), and whose liability was thus exclusively that provided by the Act. These cases are *Samuels* v. *Munson S.S. Line, Inc.*, 63 F. 2d 861 (5th Cir. 1933); *Smith* v. *The Mormacdale*, 198 F. 2d 849 (3d Cir. 1952); *cert. denied*, 345 U.S. 908 (1953); *Bennett* v. *The Mormacteal*, 160 F. Supp. 840 (E.D. N.Y. 1957); affd. *per curiam*, 254 F. 2d 138 (2d Cir.); *cert. denied*, 358 U.S. 817 (1958). All of these cases express the view that to permit condemnation of the vessel *in rem* at the suit of the owner's longshoreman-employee would deprive the shipowner of the limited liability provided by the Act, since collection of damages out of the ship is only an indirect way of collecting those damages from the owner.

In the instant case application of the teachings of the "personification" decisions is clear.

The owner is not liable at all, because the ship was seaworthy when delivered to the demisee. The demisee, having made his compensation payments, is not further liable. Should petitioner nevertheless be permitted an additional recovery from the ship as a *res*, the loss will necessarily fall upon the owner, a party who was not liable at all *in personam*, or upon one whose *in personam* liability has been limited and satisfied by a validly applicable Compensation Act (the demisee-employer).

If it be said that the general owner, by letting his vessel into the stream of commerce by demise, has voluntarily risked the value of the vessel as his stake in the enterprise and subjected her to respond to whatever claims may arise against her, we submit that he exposes it only to valid claims against the demisee, limited in amount to no more than the demisee might be called upon to respond to *in personam*. In *The Western Maid*, 257 U.S. 419 (1922), two of the vessels were demised to the United States and were in the possession of the United States when the acts occurred which as to a private party would otherwise have been torts. Yet, even as to those vessels, this Court refused to permit *in rem* responsibility after they had been returned to their general owners. The sovereign immunity which protected the vessel owned by the United States extended also, the Court held, to vessels demised to it. The principle is plainly applicable to the instant case: the demisee's quasi-immunity under the Compensation Act extended to the demised vessel.

In the light of the legal background discussed above,* the Second Circuit held in the first *Grillea* decision (*Grillea* v. *United States*, 229 F. 2d 687 (2d Cir. 1956)) that a vessel owner was not liable to a longshoreman for injury

*Except *Bennett* v. *The Normacteal*, 160 F. Supp. 840 (E.D. N.Y. 1957); affd. *per curiam* 254 F. 2d 138 (2d Cir.), *cert. denied* 358 U.S. 817 (1958), which was not yet decided.

resulting from an unseaworthy condition which arose after the vessel had been demised. The suit was brought under the Suits in Admiralty Act (46 U.S.C. §§ 741-752 (1952)) and *in rem* jurisdiction was denied because the Court felt that the libelant had not elected to proceed on principles of libels *in rem* (46 U.S.C. § 743 (1952)).

On rehearing, in the second *Grillea* decision (*Grillea* v. *United States*, 232 F. 2d 919 (2d Cir. 1956)), the Court was persuaded that an election sufficient to proceed as though *in rem* had been made. In a two-to-one decision the Court held that, although neither the United States (shipowner) nor any jural person was liable *in personam* (the employer-demisee being liable only for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1952)), liability on principles of libels *in rem* did exist. Judge Learned Hand, writing for the majority (232 F. 2d, at 924), said:

> "So far as we have found, this is a question that has never come up in the books, although, as *res integra*, we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'."*

At the close of his opinion Judge Hand referred to an indemnity clause in the charter. He apparently felt that the existence of such a clause justified the result reached. Several Courts have commented upon the significance, or lack of it, of the indemnity clause in the charter involved in *Grillea*. In any event, the Second Circuit, despite the second *Grillea* opinion, now declines to permit *in rem* lia-

*It is this principle in *Grillea* which the First Circuit labeled "novel" (R. 27; 290 F. 2d, at 815), not the principle of *in rem* liability for unseaworthiness in a proper case. See also *Vitovi* v. *S.S. Platano*, 1950 A.M.C. 1686 (S.D. N.Y. 1948) (not officially reported).

bility of the vessel to an injured person where there was no *in personam* liability of anyone not covered by a compensation statute. *Bennett* v. *The Mormacteal*, 160 F. Supp. 840 (E.D. N.Y. 1957); affd. *per curiam*, 254 F. 2d 138 (2d Cir.); *cert. denied*, 358 U.S. 817 (1958). *Pedersen* v. *Tanker Bulklube*, 170 F. Supp. 462 (E.D. N.Y. 1959); affd. *per curiam*, 274 F. 2d 824 (2d Cir.); *cert. denied*, 364 U.S. 814 (1960).

In the *Pedersen* case an employee of Todd Shipyards Corporation was injured upon the collapse of a staging welded high up on the inside of the BULKLUBE, when the bracket supporting one end of the staging collapsed because improperly constructed. At the time of the injury the BULKLUBE was withdrawn from commerce and undergoing extensive repairs at Todd Shipyards Corporation, which controlled the vessel. Pedersen libeled the BULKLUBE. National Bulk Carriers claimed the vessel as owner and defended in her behalf. Pedersen made no claim grounded upon a warranty of seaworthiness, because the vessel was withdrawn from commerce and undergoing extensive internal repairs. The cause of action was based upon the vessel's liability *in rem* resulting from the failure of National Bulk Carriers to provide a safe place to work and upon the liability of the vessel herself to libelant as a business guest for the tort of anyone in lawful possession. The Court held that, in the absence of a warranty of seaworthiness, the duty to supply a safe place to work was no more than a duty to use due care in that direction, and that, since the vessel was completely in the control of Todd, National Bulk Carriers could not be held for failure to furnish a safe place to work. There was consequently no lien arising from the breach of that claimed duty. The Court also held that the vessel was not liable *in rem* for the negligence of Todd, who had the lawful control but whose liability was circumscribed by the Longshoremen's

and Harbor Workers' Compensation Act. After pointing out that in *Bennett* v. *The Mormacteal*, 160 F. Supp. 840 (E.D. N.Y. 1957; affd. on opinion below, 254 F. 2d 138 (2d Cir. 1958); *cert. denied*, 358 U.S. 817 (1958)), the vessel was not liable *in rem* to a longshoreman-employee of the vessel's owner who was protected by the Compensation Act, the Court said:

> "In any event, it would be strange logic to hold that a vessel, owned by one who might be otherwise liable in tort but who is within the protection of the Compensation Act, cannot be reached in a proceeding *in rem*, and at the same time to hold, as libellant urges here, that a vessel owned by a wholly innocent third party can be held liable where, as here, there is no contract of indemnity, and the negligence causing the injury is solely attributable to the employer protected by the Compensation Act."

In *Noel* v. *Isbrandtsen Co.*, 287 F. 2d 783 (4th Cir. 1961), the ship WILLIAM BEVAN was owned by the United States and demised to Isbrandtsen Company. A surveyor, engaged by Isbrandtsen Company to represent its interest in an off-hire survey, was injured when a batten clip on the side of the vessel, which the surveyor was using as a hand-hold, broke because defective. The libelant sought recovery against the United States as owner and Isbrandtsen Company as charterer on grounds of negligence and on grounds of unseaworthiness, and also sought recourse against the vessel on the theory of the ship's responsibility to libelant for the injury (apart from her own unseaworthiness or the negligence of any person). Here again, as in *Pedersen, supra*, the issue of personification was squarely in the case.

It was held that there was no sufficient evidence of negligence, because inspection would probably not have disclosed the defect. It was likewise held that there could be no warranty of seaworthiness, since the vessel was completely withdrawn from commerce, was a dead ship and was well advanced in preparations for laying up. The Court then held that the ship should not be held *in rem* "as an absolute insurer for personal injury where there has been no violation of any warranty of seaworthiness and it is not established that anyone connected with her has been at fault."

Two District Court cases, both decided in 1960, have achieved the result of the second *Grillea* opinion. They are *Reed* v. *The Yaka*, 183 F. Supp. 69 (E.D. Pa. 1960),* and *Leotta* v. *The Esparta*, 188 F. Supp. 168 (S.D. N.Y. 1960).

In *Reed* v. *The Yaka* the vessel was demised (under a charter including an indemnity clause) to the longshoreman's employer. The Court found that the longshoreman was injured by unseaworthiness arising after the demise, and that the indemnity clause was not controlling. The opinion holds the characterization of the demisee as owner *pro hac vice* to be of no great significance. The Court apparently felt that, because the owner was going to get the ship back at some future time, the action *in rem* was really as much against the owner, who was not protected by the Compensation Act, as it was against the demisee-stevedore, who was so protected. That discussion begs the question, for in *Reed*, as here, the general owner out of possession was not responsible *in personam* for unseaworthiness arising after the demise. In *Reed* the District Court cited *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), as authority for the statement that—

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*Reed v. The Yaka is presently on appeal in the Third Circuit (Nos. 13,600 and 13,601) and was argued on December 18, 1961.

"The law is settled that where a stevedore [longshoreman] is injured as a result of unseaworthiness which arose after the real owner surrendered control to a bareboat charterer who is not the stevedore's [longshoreman's] employer, the stevedore [longshoreman] can still recover in an action *in rem* against the ship."

As we have already discussed (*supra*, pp. 8-9), *Crumady* did not involve a demise. The charter was a time charter and the owner remained responsible for unseaworthiness at the time of Crumady's injury.

In *Leotta* v. *The Esparta* the injured longshoreman libeled the ESPARTA *in rem* and her owner and demisee *in personam*. Libelant was employed by the demisee, which did its own stevedoring. The owner was not served and did not appear. The case came up on exceptions by the ESPARTA and the demisee on the ground that the demisee's liability was limited by the Longshoremen's and Harbor Workers' Compensation Act and that recovery against the ship would be a violation of that limited liability. It was assumed that the unseaworthiness complained of arose after the demise. The Court followed the second *Grillea* case and *Reed* v. *The Yaka*. It appears to have ignored the proposition that the general owner would not be liable at all *in personam*; for it said:

"The demisee is owner pro hac vice but only pro hac vice. The shipowner is always there in the background. If the longshoreman is given a lien on the ship for damage caused by its unseaworthiness, even though that unseaworthiness arises after the demise, that lien will burden the interest of the owner as well as the interest of the demisee." (188 F. Supp. at 169.)

Here again the Court evades the issue, which is whether the longshoreman can validly proceed against property of an owner who would not be liable *in personam*. That was the real issue in *Leotta* as it was in *Reed* v. *The Yaka*. Merely to say that the lien exists is, we submit, not enough. The principles of *in rem* liability as enunciated by this Court for almost a century join with the clear wording of a valid statute to compel a disavowal of second *Grillea's* unfortunate language and the confusion it has spawned. The owner is not liable *in personam;* the demisee has seen to his compensation payments, his exclusive liability; the vessel is not subject to suit.

IV. The bond to release M/V Caribe from arrest.

It will be noted that, because of its conclusion that the judgment of the District Court should be vacated, the Court of Appeals did not reach contentions of the respondent other than those discussed in the opinion below (R. 27; 290 F. 2d, at 816). One of the contentions not reached concerned the effect of the bond given to release the vessel. Respondent filed claim to the vessel in the form of a motion (R. 4-5). He filed with the motion a bond in the amount of $20,000 for discharge of the Caribe from arrest (R. 5-6). The motion was consented to and the discharge was ordered by the District Judge (R. 5).

In his capacity as claimant of the Caribe, respondent argued below that, if the Caribe were subjected to *in rem* liability to the petitioner, that liability could not exceed $20,000, the amount of the bond or stipulation for value, which takes the place of the *res* for all subsequent purposes. This matter was fully discussed by Judge Woolsey in the Southern District of New York in *J. K. Welding Co., Inc.*, v. *Gotham Marine Corp.*, 47 F. 2d 332 (S.D.

N.Y. 1931). See also *United States* v. *Ames*, 99 U.S. 35, 41 (1878).

No question is before this Court on the instant writ of certiorari as to the quantum of *in rem* liability. The District Judge decreed that petitioner recover from the CARIB and the personal respondent the sum of $30,000, together with interest, costs and disbursements to be taxed (R. 21-22). If this Court decides that there is *in rem* liability, the decree of the District Judge, so far as it affects the ship *in rem*, cannot be reinstated without a decision on this question.

Conclusion.

Respondent submits that the judgment of the Court of Appeals vacating the judgment of the District Court and remanding the cause for entry of judgment of dismissal should be affirmed. In the event that this Court decides that *in rem* liability of the CARIB exists, the cause should be remanded to the Court of Appeals for determination of the amount of that liability.

Respectfully submitted,

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